LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
AUG 14 1957
JOHN T. FEY, Clerk

Supreme Court of the United States

October Term, 1957

No. 371

UNITED TOWING COMPANY, ET AL., *Appellants*

v.

H. A. PHILLIPS, TRUSTEE, *Appellee*

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Fifth Circuit

CLAUDE T. ALLEN
WILLETT WILSON
Counsel for Petitioner

ALPHA LAW BRIEF CO., 402 M & M BLDG., HOUSTON 2

SUBJECT INDEX

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	3
STATEMENT	5
SPECIFICATIONS OF ERROR TO BE URGED	8
REASONS FOR GRANTING THE WRIT	10
ARGUMENT	10
CONCLUSION	14
CERTIFICATE OF SERVICE	14
APPENDIX	15

LIST OF AUTHORITIES

CASES

Blackman v. Bechtel, 80 F. 2d 505	11, 13
Congleton v. Roberts, 61 F. 902	11
Corsicana National Bank v. Johnson, 251 U.S. 90	12
Faulkner v. Magri, 90 F. 2d 808	13
Nicholson v. Scott, 50 F. Supp. 209	14
St. Louis S.W. Ry. Co. v. Mitchell-Crittenden Tie Co., 148 S.W. 1190, err. ref.	12
United Towing Co., et al. v. H. A. Phillips, Trustee, 242 F. 2d 627	2

UNITED STATES STATUTES

11 U.S.C.A. 96	4, 5
11 U.S.C.A. 107	3, 4, 5
28 U.S.C.A. 1254(1)	2

TEXAS STATUTES

Art. 1358-1	2, 3, 7, 8, 10
Art. 3996	3, 4, 6, 14

CONSTITUTION OF THE UNITED STATES

XIV Amendment	3, 10

Supreme Court of the United States

October Term, 1957

No._____

UNITED TOWING COMPANY, ET AL., *Appellants*

v.

H. A. PHILLIPS, TRUSTEE, *Appellee*

PETITION FOR WRIT OF CERTIORARI To the United States Court of Appeals for the Fifth Circuit

---

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners, United Towing Company, Greens Bayou Marine Service Company, John D. Jones, and Holt P. Daniels, pray that a writ of certiorari issue to review the Judgment and decree of the Court of Appeals for the Fifth Circuit affirming the judgment of the United States District Court for the Southern District of Texas, Houston Division.

Opinions Below

The opinion of the United States District Court for the Southern District of Texas (R. 290) is reported in *United*

Towing Company, et al. v. H. A. Phillips, Trustee, ____ F. Supp. ____. The opinion of the Court of Appeals (R. 368) is reported in *United Towing Company, et al. v. H. A. Phillips, Trustee,* 242 F. 2d 627.

Jurisdiction

The judgment of the Court of Appeals sought to be reviewed was entered April 5, 1957 (R. 368). Petition for rehearing was seasonably filed by petitioners and was denied on May 17, 1957, (R. 393). The jurisdiction of this Court is invoked under 28 U.S.C.A. Sec. 1254(1).

Questions Presented

1. Whether the Trial Court can arbitrarily refuse to accept the evidence of a pledge or transfer of a stock certificate, when all the necessary elements of the pledge or transfer under the Texas Law, V.T.C.S. Art. 1358-1, (a) are shown.

2. Whether the Trial Court and Court of Appeals' holdings were influenced by erroneous views of the law.

3. Whether, in an action by a Trustee to set aside a transfer (made more than four months prior to bankruptcy petition pursuant to a contract entered into more than a year prior) to a certificate of stock, in satisfaction of a debt, the Trial Court can substitute its own opinion of a *higher* value not supported by any offered evidence and refuse to accept the plaintiff's (Trustee in Bankruptcy) qualified real estate appraiser's lower value, so as to create a basis for its Finding that the transfer was for an unfair or inadequate consideration, and therefore made with intent to defraud other credi-

tors, under the provisions of Section 67, Subdivision (d) (2) (a) & (b) of the Bankruptcy Act, Title 11 U.S.C.A. as well as V.T.C.S. Article 3996.

4. Whether a Finding of value as stated in paragraph 3 amounts to fundamental error and is in violation of XIV Amendment, Sec. 1 of the United States Constitution.

5. Why appellants are not entitled to hold the Greens Bayou stock until their debt is paid if the stock should be worth slightly more than the debt it was transferred to satisfy since the stock has no fixed or listed market value and appraisals of its true value would necessarily vary.

Statutes Involved

V.T.C.S. Article 1358-1 (a) provides:

"Uniform Stock Transfer Act; How Title transferred. Title to a certificate and to the shares represented thereby can be transfered only: (a) By delivery of the certificate endorsed either in blank or to a specified person by the person appearing by the certificate to be the owner of the shares represented thereby; * * *.

V.T.C.S. Article 3996 provides:

"Every gift, conveyance, assignment, or transfer of, or charge upon, any estate real or personal, every suit commenced, or decree judgment or execution suffered or obtained and every bond or other writing given with intent to delay, hinder or defraud creditors, purchasers or other persons of or from what they are, or may be, lawfully entitled to, shall, as to such creditors, purchasers or other persons, their representa-

tives or assigns, be void. This article shall not affect the title of a purchaser, *for valuable consideraiton*, unless it appears that he had notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor."

Section 67, Subdivision (d) (2) (a) of the Bankruptcy Act (Section 107 (d) (2) (a), Title 11, U.S.C.A.) provides:

"Every transfer made and every obligation incurred by a debtor within one year prior to the filing of a petition initiating a proceeding under this title by or against him is fraudulent (a) as to creditors existing at the time of such transfer or obligations, if made or incurred *without fair consideration* by a debtor who is or will be thereby rendered insolvent, without regard to his actual intent."

Section 67, Subdivision (d) (2) (b) of the Bankruptcy Act (Section 107 (d) (2) (b), Title 11, U.S.C.A.) provides:

"Every transfer made and every obligation incurred by a debtor within one year prior to the filing of a petition initiating a proceeding under this title by or against him is fraudulent (b) as to then existing creditors and as to other persons who become creditors during the continuance of a business or transaction, if made or incurred *without fair consideration* by a debtor who is engaged or is about to engage in such business or transaction, for which the property remaining in his hands is an unreasonably small capital, without regard to his actual intent."

U.S.C.A. Title 11, Sec. 96, p. 609:

" * * * Where the preference is voidable, the trustee may recover the property or, if it has been converted,

its value from any person who has received or converted such property, except a bona-fide purchaser from or lienor of the debtor's transferee for a present fair equivalent value: Provided, however, That where such purchaser or lienor has given less than such value, he shall nevertheless have a lien upon such property, but only to the extent of the consideration actually given by him. * * * "

Statement

This was a suit by appellee, the Trustee in Bankruptcy (for brevity called Trustee) of C. J. Dick Towing Company (for brevity called Bankrupt or Dick) against United Towing Co. (for brevity called United), Greens Bayou Marine Service Company (for brevity called Greens Bayou), John D. Jones (for brevity called Jones), and Holt P. Daniels, Jr. (for brevity called Daniels), appellants, seeking to set aside a transfer of the capital stock of Greens Bayou in satisfaction of a debt owed by Dick (Bankrupt) to United, on the following claimed grounds:

1. That the debt was antecedent under the Bankruptcy Act.
2. That the transfer was illegal and against public policy in that the same persons were officers and directors of both companies.
3. That the transfer constituted a conveyance fraudulent in law within the meaning of Sec. 67, Subdivisions (d) (2) (a), (b) and (d) of Title 11, U.S.C.A., in that the consideration was not fair, the stock being worth substantially more than the debt settled.

Appellants' answer denied:

1. That the debt was antecedent under the Bankruptcy Act having been incurred and contracted to be paid more than one year prior to any Bankruptcy proceedings, and paid more than four months prior to Bankruptcy proceedings according to the terms of the contract agreement.

2. That the transfer was illegal or against public policy simply because the same directors managed both Dick and United because the corporations were separate legal entities, and capable in law of contracting with each other.

3. That the transfer was made by Dick without any intent to hinder, delay or defraud creditors, under the laws of Texas or Bankruptcy Acts but instead that the transfer was made for the specific purpose of enabling Dick to keep the cash money that it had on hand, necessary to continue the operation of the business rather than to pay the debt with cash and thereby be left with insufficient operating funds and a stock not readily salable.

4. That the transfer was fraudulent under the above quoted sections of the Bankruptcy Act, as well as Art. 3996, V.C.S.T. because the stock was actually transferred on October 1, 1953, more than four months prior to filing petition in Bankruptcy (pursuant to a previous contract agreement) in satisfaction of a valid debt worth more than the value of the stock transferred and therefore for a fair consideration.

Appellants alleged and proved:

1. A valid pledge of the stock by Dick to United in December of 1952, under the Texas law (V.T.C.S., Art. 1358-1 (a) for cash loans in excess of $88,000.00 (R. 165 to 168), and
2. The settlement of Dick's debt by its transfer of the stock to United on October 1, 1953 (R. 41), pursuant to the contractual agreement of January 26, 1953 set out in its directors' minutes.

It is undisputed:

1. That the Greens Bayou stock certificate represents all the stock of the company and that the only asset of the company is 16 to 18 acres of land.
2. That the land represented by the stock exchanged was encumbered to the extent of $25,000.00. (Admitted by Appellee (Plaintiff - Trustee) in his pleadings.) (R. 20, par. XVII and - 46)
3. That the amount of the debt, settled by the transfer of the stock, was $82,277.80 (R. 300).
4. That Appellee's (Plaintiff - Trustee) expert real estate appraisal witness, Mr. W. T. Peckinpaugh, Jr., placed a gross value of $87,951.00 (R. 49) on the 16 to 18 acres of land, (which would make the land worth $62,951.00 net, on his appraisal after deducting the $25,000.00 encumbrance). (Actually proven indebtedness against land was $30,000.00.)
5. That Appellants' (Defendants') expert real estate appraisal witness, Mr. Leslie Appelt, placed a gross value

of $89,492.50 (R. 50) on the 16 to 18 acres of land, (which would make the land worth $64,492.50 net, on his appraisal after deducting the $25,000.00 encumbrance).

6. That this was all the testimony of value of the 16 to 18 acres that was offered in evidence and which net value would be over $17,000.00 *less* than the amount of the debt ($82,277.80) that the transfer discharged and over $12,000.00 less than the amount of the debt discharged if we use the Court's $95,000.00 value taken from the statement in Dick's Board of Directors minutes of January 26, 1953, that they were of the opinion that the stock was worth $95,000.00 which was not offered as evidence of the value of stock and would have little weight beside the appraisal of qualified real estate men.

Specifications of Error to be Urged

The United States Court of Appeals for the Fifth Circuit erred:

1. In sustaining the Trial Court's finding that a valid pledge of the Greens Bayou stock under the Laws of Texas V.T.C.S., Art. 1358-1, (a), was not shown when it was agreed (R. 59, 60, 61) by the three officers and directors of Dick to pledge the stock, in return for a much needed cash loan by United, and Daniels was authorized to take the properly endorsed certificate (R. 318, Def. Ex. 11) from Dick's files and deliver it to United's bookkeeper who placed it in United's files, and which action was followed by the turning over to Dick of checks

from United as they were received from the sale of its tug Dauntless (R. 165 to 171, R. 111, Def. Ex. 1 to 10).

2. In sustaining the Trial Court's Finding that a valid contract was not entered into between Dick and United as recited in Dick's Directors' minutes of January 26, 1953, when the directors accepted United's offer to take the Greens Bayou stock in satisfaction of Dick's debt, due United, more than one year prior to Bankruptcy Petition, and United ratified the agreement on February 6, 1953 (R. 67), and it was performed on October 1, 1953 as provided by the agreement, more than four months prior to Bankruptcy.

3. In holding, that the same persons being directors and managers of both Dick and United corporations, Dick's action in paying back United its loan, made to Dick when Dick was badly in need of operating capital, was a fraud on the other creditors of Dick when the agreement to repay was contracted more than a year prior to petition in bankruptcy, and payment made more than four months prior to petition according to terms of the agreement, for a fair consideration.

4. In holding that the Trial Court could substitute its own opinion of higher value not based on any *offered evidence* (but on statement of (unqualified) Dick's directors in their minutes In re Re-BO Mfg. Co., Inc., 90 F. 2d 388, Syl. 3), and refuse to accept the plaintiff's (Trustee) qualified real estate appraiser's lower value so as to create a basis for its Finding that the transfer of the Greens Bayou stock

in satisfaction of a debt, was for an unfair or inadequate consideration, and therefore made with intent to defraud other creditors.

5. In holding that Appellants could not retain the Greens Bayou stock until their debt was satisfied if the stock should be appraised at a slightly greater value than the debt it satisfied, since the stock had no fixed or listed market value.

6. Because such Finding of the court, as stated in paragraph 4, is an arbitrary Finding not being supported by substantial or offered evidence, is fundamental error, and is clearly wrong and unjust and in violation of the Sec. 1 Amendment XIV of Constitution of the United States since the Court is depriving Appellants (Defendants) of their property without due process of law, and just compensation.

Reasons for Granting the Writ

1. The decision of the Court below is in disregard of and violates the plain language of the Statute V.T.C.S. Art. 1358-1, (a).

Argument

To constitute a valid pledge or transfer of stock under the laws of Texas all that is necessary is that the stock be endorsed by the person or corporation appearing on the certificate to be the owner, and delivered to its transferee. This is exactly what Mr. Daniels did after it was agreed to by the officers of both corporations. (R. 59, 60). The stock certificate was properly endorsed, (R. 172) and by its delivery the pledge or transfer was consummated and for the courts to hold that some additional action is

necessary to complete the transfer of the certificate violates the plain language of the Texas Statute.

Mr. Daniels testified to the pledging of the stock:

> Q. At that time Dick was desperately in need of cash funds?
> A. Dick needed funds.
> Q. That day when you and Mr. Jones and Mr. Casteel discussed the giving of this pledge, was Mr. Casteel down here, or did you call him?
> A. We called him on the phone in Pittsburgh and advised him of Dick's operating conditions in the needing of operating funds.
> Q. When you transferred that certificate, when you got the certificate of Green's Bayou out of the safe of C. J. Dick, where did you take it?
> A. I gave it to Mr. Jones. He gave me the check and I took it back to the Dick Company bookkeeper.
> Q. Who was that?
> A. Mr. R. G. Treadway, and Mr. Jones took the stock and walked back to United Towing Company's office and laid it on the desk of the United Towing Company bookkeeper, Mr. Hughes, who later on that same day or the following day come and asked me what should he do with the certificate of stock; at which time I told him to place it in the United Towing Company Minutes Book.

We must keep in mind that the loan to Dick in December of 1952 and the pledge of the stock by Dick was to avert a financial crash by Dick and to continue in business. *Blackmay v. Bechtel*, 80 F. 2d 505, Syl. 2. It was not necessary that the books of the company show the transfer of the stock. *Congleton v. Roberts*, 61 Fed. 902. It was to be a short term loan as it was anticipated that since Dick was in the process of selling about $200,000.00

worth of its obsolete equipment, the loan would be repaid in a few days or weeks (R. 146) and so no note was given and none deemed to be required and the loan was carried on Dick's books as a debt and sum of money due United. (R. 209).

2. The Trial Court and Court of Appeals holdings were influenced by erroneous views of the law:

(a) When they held that the offer of United to accept the Greens Bayou stock from Dick in satisfaction of Dick's debt, and the acceptance of the offer by Dick as recited in Dick's directors' minutes of January 26, 1953 and ratification by United on February 6, 1953 (R. 67), did not create a valid contract.

Argument

Such holding is in violation of the rule of contract law as set out in *St. Louis SW Ry. Co. v. Mitchell-Crittenden Tie Co.*, 148 S.W. 1191 (Error Refused) holding: "Effect is to be given to the contract from the time the parties agreed to its terms." As they did when Dick at its directors meeting of January 26, 1953 accepted United's offer. Although not necessary since they had made the offer to Dick, which Dick accepted on January 26, 1953, United, at its Directors' meeting on February 8, 1953, accepted or ratified the January 26, 1953 contract (R. 67).

(b) When they held that, under *Corsicana National Bank v. Johnson*, 251 U.S. 90, the transfer of stock to United by Dick in settlement of Dick's debt to be valid must have been to the advantage of Bankrupt (Dick) and its creditors (R. 302, 303).

Argument

This is not the Bankruptcy law and never has been. It is never to the advantage of the rest of the creditors of a bankrupt for one of their number to be paid more than four months before bankruptcy but it is not in violation of the Bankruptcy Act or law so long as consideration is fair, *Faulkner v. Magri*, 90 F. 2d 808 Syl. 3. On the facts the instant case is completely distinguishable from the *Corsicana National Bank* case in that in the latter case the Bank having made an excessive loan, transferred the notes to a Loan Company, managed by the same officers and directors as the bank, for their full face value, after the insolvency of the maker had been brought to light, thereby attempting to escape a loss on its excessive loan. In the instant case the officers and directors of Dick, who were also the stockholders when they transferred the stock to United in satisfaction of Dick's debt to United, were simply paying off a perfectly valid debt that was owed United for money advanced to Dick to avert a financial crash, *Blackman v. Bechtel*, 80 F. 2d 505. So long as the debt was paid prior to four months of bankruptcy Dick had the legal right to prefer any creditor it chose, *Faulkner v. Magri*, 90 F. 2d 808 Syl. 3, and the law applicable to the facts in the Corsicana National Bank transfer would not be applicable to the situation in the Dick transfer of stock, the latter being a repayment of a valid debt or loan. The fact that some of the stockholders of United were the same as Dick's and might thereby indirectly benefit by the repayment of the debt or loan by Dick did not in any way make the repayment fraudulent, so long as the debt was valid to start with and the Court has found a valid debt of $82,277.80 (R. 299).

The Court's finding of a $95,000 value of the Greens Bayou property is based upon a mistaken concept of the offered evidence of value as no $95,000 appraisal value was offered, and the Court's failure to consider and deduct the $25,000 admitted encumbrance in finding the net value of the property transferred causes the Court to reach an erroneous concept of value. Upon considering and deducting the admitted encumbrance against the property the fair net value becomes much less than the debt is was exchanged in satisfaction of. *Nicholson v. Scott*, 50 F. Supp. 209 Syl. 5. The consideration being fair, Sec. 67 Sub. (d) (2) (a), (b) & (d) and *Vernon's Texas Civil Statutes*, Art. 3996 are not applicable.

In the Trial Court's own language (R. 307) under these statutes the transfer is not fraudulent, however unless incurred without fair consideration.

Conclusion

For these reasons, it is respectfully submitted that the petition for Writ of Certiorari should be granted.

CLAUDE T. ALLEN

WILLETT WILSON
Counsel for Petitioner

Certificate of Service

A copy of the foregoing brief has been served upon Thad Grundy, Esq., attorney for appellee, by mailing the same to his office, 1720 Niels Esperson Building, Houston, Texas, this 13th day of August, 1957.

APPENDIX

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 16292

UNITED TOWING COMPANY, GREENS BAYOU MARINE SERVICE COMPANY, JOHN D. JONES AND HOLT P. DANIELS, *Appellants*,

VERSUS

H. A. PHILLIPS, TRUSTEE, *Appellee*

Appeal from the United States District Court for the Southern District of Texas

(April 5, 1957)

Before HUTCHESON, Chief Judge, and CAMERON and JONES, Circuit Judges.

JONES, Circuit Judge: John D. Jones, Holt P. Daniels, and Harland I. Casteel, owned all of the stock of C. J. Dick Towing Company, herein sometimes called Dick or the bankrupt. These three individuals owned substantially all of the stock of United Towing Company, herein referred to as United. Dick owned all of the stock of Greens Bayou Marine Service Company, herein called Greens Bayou. The three individuals were the officers and directors of each of the three corporations. On Feb-

ruary 26, 1954, an involuntary petition in bankruptcy was filed against Dick and it was thereafter adjudged bankrupt. H. A. Phillips was appointed trustee of Dick, the Bankrupt, and brought suit against United, Greens Bayou, Jones and Holt to set aside as fraudulent a transfer of the Greens Bayou stock by Dick to United. Casteel lived in Pennsylvania and was not made a party. The district court held the transfer fraudulent and the defendants have appealed.

In the latter part of 1952 Dick was in financial difficulties. United had loaned Dick substantial sums. No notes or other evidences of indebtedness were given for these loans. More money was needed by Dick. United had negotiated for the sale of a tugboat from which it was about to receive some money. Daniels testified that,

> "* * * we agreed by discussion, called Mr. Casteel, that United was to receive considerable sums of cash money from the sale of this boat and that we were willing to advance to C. J. Dick Towing Company almost the entire proceeds in excess of $100,000 to C. J. Dick Towing Company, but because of the fact that at that time there was already an existing debt owing by Dick to United, for the sake of other stockholders so we would not breach our fiduciary relationship to them, and so we would have some collateral or security that any loaning institution might require—the only thing that would be of any value to United to hold until those funds might be repaid was the stock in Greens Bayou Marine Service Company; and in December of 1952 and concurrent with the first tender of this 10,000-dollar check I have previously mentioned, we did in essence and in fact take the Greens Bayou stock out of Dick Company's file and place it in United Company's files. It had already been indorsed and was transferable after

the indorsement of the stock; and that stayed in United's files until we actually concluded as evidenced by the books on October 1, 1953, the actual surrender of that stock by United and issuance of new certificates by Greens Bayou to United for the stock in the company."

In the records of the Bankrupt are minutes of a meeting of its directors dated January 26, 1953, from which we quote the following:

"John D. Jones, President of the Company, stated to the meeting that the Company was indebted to the United Towing Company at January 31, 1953, after all January transactions had been recorded in the approximate amount of $107,000.00. The President further stated that United Towing Company in consideration of its substantial recent cash advances to C. J. Dick Towing Company had demanded that appropriate guarantee of payment be made. The President fully considered the matter with United Towing Company and after lengthy discussion during which it was recognized that some portion of the indebtedness would be paid by C. J. Dick Towing Company prior to June 30th, 1953, in the approximate amount of $20,000.00 during the ordinary course of business between the two companies, United Towing Company offered to cancel and extinguish the sums due it on June 30th, 1953, in the amount of approximately $105,000.00 less whatever sums C. J. Dick Towing Company is able to repay in the interim period in exchange for the transfer to United Towing Company on October 1, 1953, of the common stock in Greens Bayou Marine Service Company held by C. J. Dick Towing Company, C. J. Dick Towing Company's note receivable from Greens Bayou Marine Service Company in the amount of $15,000.00 and the account receivable from Greens Bayou Marine

Service Company owing to C. J. Dick Towing Company on October 1, 1953, in whatever amount was owing on that date.

"Upon lengthy discussion of these facts presented to the Board by the President with regard to indebtedness to United Towing Company the Board was of the opinion that the settlement proposed would result in conveyance of an equity in common stock worth about $95,000.00 together with notes and accounts receivable in excess of $35,000.00 for discharge of a debt amounting to about $85,000.00, however, inasmuch as United Towing Company has advanced during the last sixty days, upon guarantee of sufficient security, sums of money in excess of $88,000.00 to secure the continued operation of C. J. Dick Towing Company, and without which funds C. J. Dick Towing Company could not continue to exist, there being no other source of capital available the Board.

"RESOLVED that the President and Secretary and Treasurer be and hereby are authorized to accept the offer of United Towing Company and to discharge the indebtedness of United Towing Company in the manner outlined in these minutes by execution of appropriate instruments of transfer and assignment to United Towing Company."

Daniels testified that on the 5th or 6th of February, 1953, the offer of the Bankrupt, shown by its minutes, to exchange the stock for a cancellation of the debt, was accepted by United.

On October 1, 1953, the stock of Greens Bayou was transferred to United. This date was within a year prior to bankruptcy. On this date the indebtedness of the Bankrupt to United was $82,277.80. The district court found that the stock had a value at the time of the transfer of not less than $95,000. It found that the Bankrupt was in-

solvent in December, 1952, the time of the purported pledge, on January 26, 1953, the date of a meeting of the Bankrupt's directors as shown by the minutes, in February, 1953, the time of the alleged acceptance or ratification, and on October 1, 1953, the date of the transfer. The court found that the stock of Greens Bayou was not validly pledged by the Bankrupt to United in December, 1952, as the only evidence purporting to show a pledge was the taking of the stock certificate, which had been previously indorsed in blank, from one office room to another next door; that the corporate action of the Bankrupt at its directors' meeting of January 26, 1953, was not shown by convincing evidence to have become a binding contract; and that the stock was transferred by the Bankrupt to United on October 1, 1953, for a consideration that was inadequate and unfair, and with an intent to hinder, delay and defraud the creditors of the Bankrupt. The district court found that the stock in the Bankrupt corporation of the three individuals, who acted for it and for United, had little if any value, and that by the transfer of the Greens Bayou stock the individuals profited by the benefit to United, and the financial condition of the Bankrupt was made worse. It was held that the transfer of the Greens Bayou stock was void under Sec. 67(d)(2)(a) of the Bankruptcy Act, 11 U.S.C.A. §107(d)(2)(a), Sec. 67(d)(2)(b) of the Bankruptcy Act, 11 U.S.C.A. §107(d)(2)(b), and Vernon's Ann. Civ. Stat. Art. 3996. Judgment was rendered directing United to transfer and deliver the stock to the plaintiff trustee in bankruptcy.

Appealing from the adverse judgment, United and its directors urge that there was a valid transfer by pledge in December, 1952, and by way of sale in January, 1953,

or February, 1953, that the consideration was fair, and that the court considered evidence which had been excluded.

First for our consideration and, we think, the most important question to be resolved, is whether there was error in the determination of the district court that there was no valid pledge of the Greens Bayou stock by the Bankrupt to United in December, 1952. Corporate directors and officers are agents of the corporations electing or appointing them. The general rule, where two corporations have the same person acting for them, has thus been stated:

> "In accordance with the principle that a director or officer of a corporation cannot, without the knowledge and consent of the corporation or its stockholders, represent an adverse party to a transaction with the corporation, it is also true that where a transaction or contract is entered into between corporations having officers or directors in common, this circumstance will be considered and the transaction will be jealously regarded by the law." 13 Am. Jur. 953, Corporations §1000.

A somewhat similar case had its origin in the Northern District of Texas and was twice before this court. *Corsicana National Bank v. Johnson*, 218 F. 822, 237 F. 1018. On the first appeal a remand followed a decision on a procedural question. On the second appeal no opinion was written by this court. The Supreme Court of the United States reviewed the decision and in its opinion said:

> "Was there good cause for the recission? The fact that the same persons were directors and managers of both corporations subjects their dealings *inter sese* to close scrutiny. That two corporations have a majority or even the whole membership of

> their boards of directors in common does not necessarily render transactions between them void; but transactions resulting from the agency of officers or directors acting at the same time for both must be deemed presumptively fraudulent unless expressly authorized or ratified by the stockholders; and certainly where the circumstances show, as by the undisputed evidence they tended to show in this case, that the transaction would be of great advantage to one corporation at the expense of the other, especially where in addition to this the personal interests of the directors or any of them would be enhanced at the expense of the stockholders, the transaction is voidable by the stockholders within a reasonable time after discovery of the fraud." *Corsicana National Bank v. Johnson*, 251 U.S. 68, 90, 40 S. Ct. 82, 64 L. Ed. 141.

The opinion from which the foregoing quotation was taken was followed two years later by another leading case in which the court used the following language:

> "The relation of directors to corporations is of such a fiduciary nature that transactions between boards having common members are regarded as jealously by the law as are personal dealings between a director and his corporation, and where the fairness of such transactions is challenged the burden is upon those who would maintain them to show their entire fairness and where a sale is involved the full adequacy of the consideration. Especially is this true where a common director is dominating in influence or in character. This court has been consistently emphatic in the application of this rule, which, it has declared, is founded in soundest morality, and we now add in the soundest business policy." *Geddes v. Anaconda Mining Co.*, 254 U.S. 590, 599, 41 S. Ct. 209, 65 L. Ed. 425.

The Geddes case is cited and the above quoted language is quoted with approval by the Court of Civil Appeals of

Texas. *Felty v. National Oil Co. of Texas*, 155 S.W. 2d 656. The doctrine is applicable where the directors of one corporation cause its property to be encumbered for the benefit of another corporation of which they are also directors. *Sweeney v. Grape Sugar Co.*, 30 W. Va. 443, 4 S.E. 431, 8 Am. St. Rep. 88. Has United and its stockholding directors met the burden cast upon them?

The only evidence upon which they rely to sustain a pledge is the testimony of Daniels. It was his testimony that "We were willing to advance" funds to the Bankrupt, "and so we would have some collateral or security", that "the only thing that would be of any value to hold until those funds might be repaid was the stock in Greens Bayou Marine Service Company" and "we did in essence and in fact take the Greens Bayou stock out of Dick Company's file and place it in United Company's file". The "we" who were willing to advance funds were the directors of United, the "we" who would have some security were the directors of United, and they were the same persons who as "we", "did in essence and in fact" take the stock from the Bankrupt's file and transfer it to United's file although, in response to a leading question, Daniels testified that it was as an officer of United that he gave directions to its bookkeeper as to the place where the stock certificate should be kept. There was no writing to evidence either the debt or the pledge and there were no minutes of either pledgor or pledgee. The January 26, 1953, minutes recited a discussion of the proposed transfer of stock in cancellation of the debt but did not make reference to any prior pledge of the stock unless it can be said that there was such a reference in the recital commenting on United's advances to the Bankrupt "during the last sixty days upon guarantee of security".

The Texas statute, which the transfer challenged, is:

> "Every gift, conveyance, assignment or transfer of, or charge upon, any estate real or personal, every suit commenced, or decree, judgment or execution suffered or obtained and every bond or other writing given with intent to delay, hinder or defraud creditors, purchasers, or other persons of or from what they are, or may be, lawfully entitled to, shall, as to such creditors, purchasers or other persons, their representatives or assigns, be void. This article shall not affect the title of a purchaser, for valuable consideration, unless it appear that he had notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor." Vernon's Ann. Civ. Stat. Art. 3996.

The provisions of Sec. 67(d)(2) which was the basis of the attack upon the transfer, are:

> "Every transfer made and every obligation incurred by a debtor within one year prior to the filing of a petition initiating a proceeding under this title by or against him is fraudulent (a) as to creditors existing at the time of such transfer or obligation, if made or incurred without fair consideration by a debtor who is or will be thereby rendered insolvent, without regard to his actual intent; * * * or (d) as to then existing and future creditors, if made or incurred with actual intent as distinguished from intent presumed in law, to hinder, delay, or defraud either existing or future creditors". 11 U.S.C.A. § 107(d)(2).

Amply supported by the evidence are the findings that there was no valid pledge of the Greens Bayou stock in December, 1952, and no valid transfer or agreement to transfer the stock prior to October, 1953. The evidence supports the district court's holding that the transfers were fraudulent under the Texas act and under the quoted provisions of the Bankruptcy Act. There seems to be no

doubt as to the authority of a trustee in bankruptcy to attack a transfer fraudulent under the Texas statute. *Reeves v. Powell,* Tex. Civ. App., 267 S.W. 328.

The appellants assign error based upon the following statement in the district court's findings of fact:

> "The record shows many transactions which I think show this [fraudulent] intent.
>
> "There was offered, however, evidence of a number of transactions between Bankrupt and the Second National Bank of Houston which, if admissible in evidence, would have an important bearing on the question of such intent, but upon the objections of Defendants I have excluded them."

We do not regard this as showing, as appellants contend, that the court considered inadmissible evidence. On the contrary, it shows that the evidence, although material, has been excluded and had not been considered.

The appellants, in urging that the trial court was in error in finding the transfer of the stock unfair to the Bankrupt and for an inadequate consideration, attempt to demonstrate that the value of the Greens Bayou stock was considerably less than the amount of the debt of the Bankrupt to United rather than considerably more as found by the court. On confusing and conflicting evidence, which we have no occasion to here review, the court made findings amply supported. These findings we should not, even if so disposed, disturb.

We think the judgment entered was a proper one. It carries out sound policy as to the fiduciary obligations imposed upon corporate directors. The judgment is

AFFIRMED.

JUDGMENT.

Extract from the Minutes of April 5, 1957

UNITED TOWING COMPANY, GREENS BAYOU MARINE SERVICE COMPANY, JOHN D. JONES and HOLT P. DANIELS,

No. 16292. versus

H. A. PHILLIPS, TRUSTEE.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, United Towing Company, Greens Bayou Marine Service Company, John D. Jones and Holt P. Daniels, and the surety on the appeal bond herein, The Aetna Casualty and Surety Company, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

* * *